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Chance v. BP Chemical, Inc.: Changing Ohio's Perception of Stigma Damages

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CHANCE v. BP CHEMICAL, INC.: CHANGING OHIO'S PERCEPTION OF STIGMA DAMAGES

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I. INTRODUCTION

An increased public awareness of environmental hazards has filled the courts with plaintiffs seeking damages for the potential harm a contaminant may cause. Typically, the principle of damages is a simple one. Before damages can be awarded, some type of injury or harm must have occurred. If there is actual property contamination, recovery is clear and the issue becomes the amount of damages.² Actual harm has been defined as "physically perceptible" or "capable of physical detection" or having some "physical impact on a plaintiff's property."³ But such harm is often not present.

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² Property damage is categorized as either permanent or temporary. *Ohio Collieries Co. v. Cocke*, 140 N.E. 356, 359 (Ohio 1923). Permanent damage is irreparable, and thus, the court will award damages for the difference in the market value of the property as a whole before and after the injury. *Id.* If the damage is temporary, then it is capable of remediation or repair, and the appropriate measure of damages is the reasonable cost of restoration plus reasonable compensation for the loss of the use of the property between the time of the injury and the restoration. *Id.*

³ *Adams v. Star Enter.*, 51 F.3d 417, 423 (4th Cir. 1995) (holding plaintiffs could not recover stigma damages because an underground oil spill was not visible or capable of physical detection from the landowner's property). *See also* *Ogden v. Star Enter.*, No. 94-2488, 1995 U.S. App. LEXIS 33686, at *2-3 (4th Cir. Dec. 4, 1995) (finding actual contamination or physical harm is required for property damage recovery); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993) (holding property owners could not recover damages where evidence failed to establish some physical damage to the plaintiff's land caused by defendant); *Lamb v. Martin Marietta Energy Sys.*, 835 F. Supp.

Individuals living next to landfills or industrial businesses are concerned that environmental hazards will adversely affect their property values and/or their health. The individuals file claims asserting these allegations, and seek compensation for their concern, even when there is no concrete evidence of harm. Thus, in order to pursue these claims, plaintiffs have increasingly relied on the theory of "stigma damages."

In ordinary terms, a stigma is "an identifying mark or characteristic."⁴ Expanding this concept to the property damage arena, a claim for stigma damages arises when: "[t]he value of real property decreases or is eliminated due to a public perception that the property is contaminated, threatened with contamination, or there is fear (whether rational or not) of contamination from a neighboring property."⁵ The fear associated with stigma involves three components: fear of (1) the cost of remediation if the contaminant enters the property; (2) an increased risk of liability to the public; and (3) financing problems resulting in connection with a contaminated property.⁶ Jurisdictions are split on the issue of whether or not to allow recovery for this type of speculative injury. The majority of courts have held that stigma damages alone cannot be recovered, and instead, actual physical impact is required before a court will award damages.⁷

959, 969 (W.D. Ky. 1993)(mandating a physical invasion of the property before a court may award nuisance damages).

⁴WEBSTER NEW COLLEGIATE DICTIONARY 1134 (6th ed. 1981).

⁵Andrew N. Davis & Santo Longo, *Stigma Damages in Environmental Cases: Developing Issues and Implications for Industrial and Commercial Real Estate Transactions*, 25 ENVTL. L. REP. 10345 (1995). Stigma is not limited to environmental contamination cases. Stigma damages have been claimed for buildings that have had structural damage or for properties that have been infested by termites. See Timothy J. Muldowney & Kendall W. Harrison, *Stigma Damages: Property Damage and the Fear of Risk*, 36 DEF. COUNS. J. 525 (Oct. 1995). See, e.g., *Anderson v. Bauer*, 681 P.2d 1316 (Wyo. 1984)(granting stigma damages because of the reputation in the area for water problems to plaintiffs whose basement had been subject to water damage); *Tudor Chateau Creole Apts. v. D.A. Exterminating Co., Inc.*, No. 96 CA0951, 1997 La. App. LEXIS 395, at *1 (La. Ct. App. Feb. 14, 1997)(awarding stigma damages to plaintiffs for prior termite damage).

⁶See *Finkelstein v. Department of Transp.*, 656 So.2d 921, 924 (Fla. 1995)(quoting MELVIN A. RESKIN & PATRICK J. ROHAN, 8 NICHOLS' THE LAW OF EMINENT DOMAIN § 14C.06, at 14c-52-53 (1994)).

⁷See, e.g., *United States v. 6.24 Acres of Land*, No. 95-3183, 1996 U.S. App. LEXIS 27761, at *16-17 (6th Cir. Oct. 22, 1996)(affirming the decision of the Western District of Michigan rejecting a stigma damage claim in a takings case); *Adams*, 51 F.3d at 423 (applying Virginia law and concluding that plaintiffs had failed to state a cause of action for nuisance while alleging stigma damages without any physical impact on the property); *Berry*, 989 F.2d at 829 (applying Mississippi law and rejecting a claim for stigma damages when defendant did not actually damage plaintiffs' properties); *Lamb*, 835 F. Supp. at 969 (applying Kentucky law and rejecting plaintiffs' claim for public perception damages); *Ogden*, 1995 U.S. App. LEXIS 33686, at *2-3 (applying Virginia law and finding that neither fear of harm or mere proximity to contamination is sufficient for recovery); *O'Neal v. Department of Army*, No. 1:CV-90-1073, 1994 U.S. Dist. LEXIS 6569, at *25 (M.D. Pa. May 16, 1994)(holding Pennsylvania would not recognize a claim

Ohio courts have reached conflicting conclusions on the issue of stigma damages. Recently however, in *Chance v. BP Chem., Inc.*,⁸ the Ohio Supreme Court held that it will not permit plaintiffs to rely on allegations of stigma.⁹ Instead, affirmative evidence of actual harm is necessary for property damage recovery.¹⁰ Thus, the *Chance* case sets favorable Ohio precedent precluding plaintiffs from filing claims based solely on their fear or the alleged perception of the community.

II. THE CHANCE OPINION

In July 1991, three named plaintiffs filed suit on behalf of citizens of the city of Lima owning an interest in property located within a five mile radius of BP Chemical's ("BP") two-hundred acre chemical-refining facility in Lima, Ohio.¹¹ BP had three active deepwells at the Lima site, which were permitted by the

for damages solely from the stigma of contamination); *Putnam v. New York*, No. 74058, 1996 N.Y. App. Div. LEXIS 82, at *4 (N.Y. Sup. Ct. Jan. 11, 1996)(rejecting claimant's stigma damage claim); *Leaf River Forest Prods. v. Ferguson*, No. 92-CA-00387-SCT, 1995 Miss. LEXIS 557, at *53 (Oct. 19, 1995)(finding mere stigma is insufficient evidence of compensable injury); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 727 (Mich. 1992)(rejecting plaintiff's nuisance cause of action where damage and injury were both predicated on third parties' unfounded fear).

Very few courts have awarded damages solely based on stigma or public perception. See *Bartleson v. United States*, 96 F.3d 1270, 1275-76 (9th Cir. 1996)(applying California law and allowing stigma damages in condemnation case); *City of Sante Fe v. Komis*, 845 P.2d 753, 757 (N.M. 1992)(finding that diminution in market value caused by public fear was compensable in an eminent domain proceeding).

Some courts will award stigma damages, in addition to other property damages, once a plaintiff has presented evidence that defendant's acts physically affected plaintiff's property. See *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 796 (3d Cir. 1994) (setting forth a three-step test for stigma damage recovery: (1) defendants have caused some temporary, physical damage to plaintiffs' property; (2) repair of damage will not restore the value of the property to its prior level; and (3) there is some ongoing risk to the property); *Nashua Corp. v. Norton Co.*, No. 90-CV-1351, 1997 U.S. Dist. LEXIS 5173, at *18 (N.D.N.Y. Apr. 15, 1997)(holding that a property owner who had presented evidence that his property could not be restored to its precontaminated condition could present evidence of stigma damages under New York law). Consistent with these cases, one article explained that the success of a claim for stigma damages "generally depends on whether the problem alleged to create the stigma has physically affected the plaintiffs property." Muldowney & Harrison, *supra* note 5, at 529. Owners who have not actually been touched by environmental contamination have been consistently precluded from stigma damage recovery. *Id.* Others who have provided evidence of actual property damages have had more success with stigma damage claims. *Id.* at 530 (citing *Frank v. Environmental Sanitation Mgmt. Inc.*, 687 S.W.2d 876 (Mo. 1985); *Stevinson v. Defenbaugh Indus., Inc.*, 870 S.W.2d 851 (Mo. Ct. App. 1993)).

⁸670 N.E.2d 985 (1996).

⁹*Id.*

¹⁰*Id.* at 993.

¹¹*Chance v. BP Chem., Inc.*, Nos. 66622, 66645, 67369, 1995 Ohio App. LEXIS 1250, at *2 (Cuyahoga County Ct. App. Mar. 30, 1995).

Ohio Environmental Protection Agency and the United States Environmental Protection Agency.¹² Plaintiffs claimed that hazardous liquid waste from BP's deepwell disposal process migrated below their property.¹³ Based on this contention, plaintiffs sought a permanent injunction to halt BP from utilizing the disposal process in addition to \$1 billion in general and punitive damages based on the theories of trespass, nuisance, negligence, strict liability and fraudulent concealment.¹⁴

III. THE PROCEDURAL HISTORY AND TRIAL COURT DECISION

On June 17, 1992, plaintiffs moved for class certification.¹⁵ Then on October 21, 1992, BP moved for summary judgment on all of plaintiffs' claims for relief.¹⁶ The trial court granted BP's motion for summary judgment only as to plaintiffs' indirect claim for emotional distress damages and the request for punitive damages.¹⁷ On March 23, 1993, the trial court bifurcated the litigation into separate liability and damage phases, and on November 3, 1993, the trial began.¹⁸

At the close of plaintiffs' case, the trial court issued a directed verdict to BP on plaintiffs' claims for fraud, nuisance and ultra hazardous activity.¹⁹ The jury returned a verdict in favor of BP on plaintiffs' trespass claim.²⁰ Both parties appealed.²¹

¹²*Id.* at *2 n.1; *Chance*, 670 N.E.2d at 987. BP's deepwells open into two separate geological formations.

¹³*Chance*, 1995 Ohio App. LEXIS 1250, at *2.

¹⁴*Id.*

¹⁵*Id.* at *3.

¹⁶*Id.*

¹⁷*Id.* at *3. Plaintiffs sought damages for some type of emotional distress, but did not specifically plead emotional distress as an independent cause of action in their complaint; thus, their claim for emotional distress damages was indirect. *Id.* at *17-19.

¹⁸*Chance*, 1995 Ohio App. LEXIS 1250, at *3. Bifurcation is a mechanism used by courts to divide a complicated case into two or more separate phases, where different issues are tried at each phase. See BLACK'S LAW DICTIONARY 163 (6th ed. 1990). The advantage of trying liability and damage issues separately is that "if the liability issue is determined in defendant's favor there is no need to try the damage question" *Id.*

¹⁹*Chance*, 1995 Ohio App. LEXIS 1250, at *3. A judge grants a directed verdict when the party with the burden of proof has failed to present a prima facie case for jury consideration. BLACK'S LAW DICTIONARY 459 (6th ed. 1990). Thus, the "judge may order the entry of a verdict without allowing the jury to consider it, because, as a matter of law, there can be only one such verdict." *Id.*; FED. R. CIV. P. 50(a).

²⁰*Chance*, 1995 Ohio App. LEXIS 1250, at *3.

²¹*Id.* at *1.

IV. THE APPELLATE COURT DECISION

The Cuyahoga County Court of Appeals upheld the jury verdict and reversed the trial court's partial denial of BP's motion for summary judgment. The majority of the appellate court's opinion addresses plaintiffs' lack of evidence to support their trespass claim as well as the issue of subsurface property rights. A major point of contention associated with plaintiffs' trespass claim was the extent of lateral migration from BP's deepwells, and both sides had presented expert testimony on the topic.²²

The court found that plaintiffs failed to prove an actionable trespass.²³ Noting that Ohio does not accept the *ad coelum maxim* that surface holders own from the center of the earth to the heaven, the court of appeals applied the negative rule of capture and determined that an "owner of land owns as much of the space above him as he [or she] uses, but only so long as he [or she] uses it. All that lies beyond belongs to the world."²⁴ Additionally, the water located in the formations below plaintiffs' properties, which could potentially be affected by BP's deepwell disposal process, was the water of the state, thus plaintiffs had no right to it.²⁵

The court of appeals went a step further and held that summary judgment should have been granted for BP on all of plaintiffs' claims, including trespass.²⁶ The court explained that, even if plaintiffs could present a prima

²²BP's expert, Dr. John Pickens, testified that based upon the most conservative migration rate of six inches per year, the plume of organic waste was more than one-quarter mile away from plaintiff Chance's home, and the molecules of inorganic waste would never pass beneath Chance's property because they were migrating in a westerly direction. *Id.* at *5 n.3. Additionally, the plume was at least one-half mile away from all the other properties in the class, and the concentration of one of the toxins, acrylamide, was one thousand times lower than the detection limit for the chemical and sixty times lower than the Safe Drinking Water Standard. *Id.*

²³*Id.* at *9.

²⁴*Id.* at *6 (citing *Willoughby Hills v. Corrigan*, 278 N.E.2d 658 (Ohio 1972)). The law of negative capture is based on the migratory nature of oil, gas, water and certain minerals. *Id.* It holds that a party may inject into the earth substances that migrate into the land of another even if it causes displacement under the land of more valuable with less valuable substances. *Id.* at *6-7 (citing *Railroad Comm'n v. Manziel*, 361 S.W.2d 560 (Tex. 1962)).

²⁵*Chance*, 1995 Ohio App. LEXIS 1250, at *7-8. The Ohio Revised Code defines "waters of the state" as:

All streams, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, which are situated wholly or partly within, or border upon, this state, or are within its jurisdiction

OHIO REV. CODE ANN. § 6111.01(H) (Anderson 1997).

²⁶*Chance*, 1995 Ohio App. LEXIS 1250, at *9.

facie case of trespass, plaintiffs needed evidence of actual and substantial damages to have an actionable claim.²⁷ The named plaintiffs admitted, however, that BP had not caused any actual damage to their property or injury to their persons.²⁸ Accordingly, the court found that plaintiffs "presented no evidence that their underground water supply was contaminated or that their property was adversely affected in any perceivable way."²⁹ The court stated that without actual evidence of real harm, plaintiffs' claim for theoretical and conceptual harm, or stigma damages, must be rejected.³⁰

The court of appeals explained why claims for stigma damages must be foreclosed:

Our legal system does not and cannot recognize actions for unsustained, conceptual or future damage. To do so, particularly in this context, would be to declare "open season" not only on BP Chemicals, but on any entity whose enterprise involves the disposal of hazardous byproduct waste and the fear that such disposal engenders. Actions, driven purely by fear, could threaten entire industries, forcing them to mount costly defenses or submit to costly settlements, potentially transforming our legal process into a vehicle for extortion.³¹

Thus, this overriding public policy negates any reason to substantiate plaintiffs' fear by transforming it into a claim for damages.

As for the plaintiffs' other claims, the court of appeals found that plaintiffs presented no affirmative evidence that BP operated the wells negligently or that any such negligence substantially interfered with plaintiffs' use and enjoyment of their property.³² These findings eliminated plaintiffs' claims for negligence and nuisance. Plaintiffs did not have affirmative evidence of actual harm to uphold their claim for ultra hazardous activity.³³ Plaintiffs also failed to present any facts demonstrating that BP engaged in misrepresentations or

²⁷*Id.* at *8. Pursuant to *Brown v. Scioto County Bd. Comm'rs.*, 622 N.E.2d 1153, 1161 (Ohio Ct. App. 1993), for actionable trespass plaintiffs needed to demonstrate an interference with their exclusive possessory interest. The requisite elements include: (1) through defendant's intentional conduct; (2) with reasonable foreseeability; (3) some substance entered on the land affecting its nature and character; and (4) caused substantial damage to the residence. *Id.*

²⁸*Chance*, 1995 Ohio App. LEXIS 1250, at *9. Specifically, the three named plaintiffs testified that they "were concerned or angry when they heard, mostly through word of mouth with some media coverage, essentially unsubstantiated information on the issue of injectate migration." *Id.* at *9 n.6.

²⁹*Id.* at *22.

³⁰*Id.* at *22-23.

³¹*Id.* at *22.

³²*Id.* at *24.

³³*Chance*, 1995 Ohio App. LEXIS 1250, at *24.

concealment that would support their claim for fraud.³⁴ Finally, the court of appeals upheld the trial court's granting of summary judgment on plaintiffs' claims for intentional infliction of emotional distress and punitive damages.³⁵

V. THE OHIO SUPREME COURT DECISION

Without much discussion, the Ohio Supreme Court upheld summary judgment in favor of BP on emotional distress and punitive damages, as well as the directed verdict in favor of BP on plaintiffs' claims for nuisance, fraud and ultra hazardous activity.³⁶ The majority of the supreme court's opinion analyzed the issue of trespass and the necessity of presenting evidence of actual harm.

The supreme court, like the appellate court, held that the principle that ownership of land extends to the periphery of the universe has no place in the modern world.³⁷ Instead, the supreme court found that plaintiffs have a limited property interest in the rock in which the liquid waste is placed, and BP could be liable if the liquid waste interferes with the reasonable and foreseeable use of this property.³⁸ Thus, in order to be successful with their trespass claim, plaintiffs needed to demonstrate "some type of physical damages or interference with use" that is both reasonable and foreseeable.³⁹

The supreme court flatly rejected plaintiffs' request to substitute affirmative evidence of physical damages with evidence that an environmental stigma associated with the deepwells had a negative effect on their property values due to the public perception that there may be dangerous injectate below their properties.⁴⁰ The supreme court found that the trial court correctly imposed a requirement on plaintiffs to prove "actual damages, [and] . . . did not abuse its discretion in foreclosing [plaintiffs] from presenting evidence of speculative stigma damages."⁴¹ Since plaintiffs presented no evidence of actual damages, their trespass claim failed.

³⁴*Id.* at *25.

³⁵*Id.* at *17-19. First, the court explained that the parties were involved in the liability phase of the trial, not the damage phase. Additionally, plaintiffs had no evidence satisfying any of the elements of intentional infliction of emotional distress nor any evidence of actual malice or conscious wrongdoing for their punitive damage claim. *See id.* at *18. For intentional infliction of emotional distress, plaintiffs needed to present evidence that the distress is severe and debilitating or it is accompanied by other injuries. *Id.*

³⁶*Chance*, 670 N.E.2d at 990.

³⁷*Id.* at 991-92 (relying on *Willoughby Hills v. Corrigan*, 278 N.E.2d 658 (Ohio 1972)).

³⁸*Id.* at 992.

³⁹*Id.* at 993.

⁴⁰*Id.*

⁴¹*Chance*, 670 N.E.2d at 993.

In sum, the supreme court's holding adopts the public policy of the appellate court and creates Ohio precedent that rejects claims based solely on allegations of stigma created by the public's perception of contamination. Instead, in accordance with *Chance*, plaintiffs seeking property damage recovery must present affirmative evidence of actual harm.

VI. OTHER OHIO STIGMA DAMAGE CASES

Although the *Chance* opinion is the only statement of the Ohio Supreme Court with respect to stigma damages, two other Ohio decisions have also addressed the issue. In 1994, an Ohio jury awarded \$6.7 million in "stigma damages" to more than 1,700 owners of non-contaminated property who lived within two miles of a landfill.⁴² The class action named a number of large companies as defendants, most of which had produced or transported some form of hazardous waste to the landfill over a number of years.⁴³ The plaintiffs did not allege that any chemicals invaded their property. Instead, plaintiffs argued that their property values decreased as a result of the publicity surrounding the landfill.⁴⁴

Although there is no written opinion by the *DeSario* court, it appears that the court relied on a prior opinion in the case by the Stark County Court of Appeals, which primarily addressed class certification.⁴⁵ The Stark County Court of Appeals stated in the appendix to its opinion that the plaintiffs need not show physical intrusion onto their land in order to recover damages for a private nuisance.⁴⁶ This dicta likely influenced the trial court and has never been reviewed by the Ohio Supreme Court because the parties settled the case.⁴⁷

A federal decision based on Ohio law applied the *DeSario* dicta.⁴⁸ In *MHE Assoc.*, plaintiffs were owners of a commercial building located adjacent to defendant, who engaged in a manufacturing process that produced plating and solvent waste.⁴⁹ Leakage from defendant's storage tanks caused soil and groundwater contamination on defendant's property.⁵⁰ Judge White denied summary judgment to the defendant on plaintiffs' nuisance claim despite the

⁴²Muldowney v. Harrison, *supra* note 5, at 529.

⁴³DeSario v. Industrial Excess Landfill, Inc., 587 N.E.2d 454, 465 (Ohio Ct. App. 1991).

⁴⁴*Id.* at 461.

⁴⁵See DeSario v. Industrial Excess Landfill, Inc., 587 N.E.2d 454 (Ohio Ct. App. 1991).

⁴⁶*Id.* at 461.

⁴⁷Plaintiffs received a \$5 million settlement in 1995. *\$5 Million Class Action Settlement Preliminarily Approved in Ohio*, 7 TOXIC PROPERTY DAMAGE 11-12 (July 14, 1995).

⁴⁸MHE Assocs. Ltd. Partnership v. United Musical Instruments, USA, Inc., No. 1:93CV1883, 1995 U.S. Dist. LEXIS 5805, at *1 (N.D. Ohio Mar. 24, 1995).

⁴⁹*Id.*

⁵⁰*Id.* at *12.

fact that "there [was] little dispute between the parties that contamination of Defendant's property was contained on its property."⁵¹

The *MHE* court cited *DeSario* for the proposition that a physical invasion of plaintiffs' property is not a prerequisite to recover under a nuisance theory of damages.⁵² Instead, a plaintiff must demonstrate a sufficient "obstruction or interference with the use or enjoyment of land," which is both unreasonable and substantial.⁵³ Plaintiffs had presented evidence that they lost the ability to obtain a loan at a favorable rate and had incurred a substantial loan fee because of the environmental concerns of the bank.⁵⁴ Thus, the court concluded that plaintiffs had offered evidence of an unreasonable, substantial interference with the use of their land.⁵⁵

The *DeSario* opinion and the subsequent application of the opinion in *MHE* has alarmed many commercial property owners and regulated industries. "The possibility of neighboring property owners collecting damages even though their land is not contaminated could lead to a dramatic increase in the number of plaintiffs in pollution-related litigation, along with potential damage awards."⁵⁶ Opponents of the *DeSario* opinion claim it is legally flawed and tainted by local political considerations.⁵⁷ The *Chance* opinion, however, has minimized the potential impact of these two decisions.

VII. HOW FAR WILL CHANCE REACH?

In *Chance*, the Ohio Supreme Court connected its conclusions regarding stigma damages to its analysis of plaintiffs' trespass claim.⁵⁸ Thus, it has been

⁵¹*Id.* at *8.

⁵²*Id.*

⁵³*MHE Assocs. Ltd. Partnership*, 1995 U.S. Dist. LEXIS 5805, at *8-12.

⁵⁴Plaintiffs sought refinancing on the office building, and the bank conducted an environmental assessment on the property. The lender refused to lend money to plaintiffs citing "environmental concerns." Plaintiffs obtained financing under different and less favorable terms and expended a large amount of money in loan fees. *See id.* at *1.

⁵⁵*Id.* at *12. Although the plaintiffs in *MHE* did not have evidence that the contamination had reached their property, they did have actual damages in terms of the difference in loan rates and the amounts expended in loan fees. *Id.* at *5-6. Thus, *MHE* still requires concrete evidence of harm even though it relies on *DeSario*.

⁵⁶Davis & Longo, *supra* note 5, at 10347. For other articles discussing the impact of the *DeSario* decision, see Muldowney & Harrison, *supra* note 5, at 529; Carol J. Forrest & Greg R. Michaud, *Listening, Talking, Triumph in Promoting Effective Public Involvement*, 8 ENV'T'L SOLUTIONS 35 (July 1995); "Stigma Damages" Now Easier to Assert, 2 PENNSYLVANIA ENV'T'L COMPLIANCE UPDATE 6 (Feb. 1995).

⁵⁷Davis & Longo, *supra* note 5, at 10347. The judge was an elected official and the case affected a large part of the electorate. Therefore, critics argue the award was part of an unfair legal process. *Id.* at 10347 n.24.

⁵⁸*Chance*, 670 N.E.2d at 993.

questioned whether *Chance* will be extended to the nuisance context. A plaintiff trying to distinguish *Chance* may attempt to rely on *DeSario* and *MHE* and attach a request for stigma damages to a nuisance cause of action instead of a trespass claim.⁵⁹ The *Chance* plaintiffs did advance a nuisance claim though, and the trial court found that they did not have sufficient evidence to support such a claim.⁶⁰ The supreme court immediately affirmed the lower court's directed verdict on nuisance since plaintiffs had produced no evidence of substantial interference with use and enjoyment of property, a necessary element for nuisance recovery.⁶¹ Thus, one can reasonably infer that the *Chance* plaintiffs' stigma allegations were insufficient to satisfy their nuisance claim just as the allegations were insufficient to satisfy their trespass claim.

Additionally, some have argued that *Chance* is only applicable to subsurface property damage claims.⁶² The tone of the appellate court and supreme court opinions, however, illustrates the breadth of their holdings. The supreme court adopts the policy of the appellate court that speculative recovery based on fear alone must be eliminated.⁶³ Thus, the public policy advanced in *Chance* can easily extend to all types of property damage claims in Ohio.

VIII. THE PUBLIC POLICY IMPACTS OF THE *CHANCE* OPINION

Chance prohibits Ohio plaintiffs from relying on allegations of speculative stigma damages. Instead, plaintiffs are forced to present affirmative evidence of actual damages. This result emphasizes the importance of preventing plaintiffs from advancing claims every time they are concerned about some form of contamination. As the appellate court in *Chance* explained, validating this concern would wreak havoc on any company that may deal with some type of hazardous chemical, since it would lead to unpredictable liability and a flood of trivial lawsuits.⁶⁴ Companies providing vital services to the community, such as manufacturing essential components of a product or providing a place for waste disposal, will be threatened if such recovery is

⁵⁹Two commentators stated the position that nuisance is the "most versatile stigma cause of action because it does not require the 'duty' element of negligence and may not depend on the strict physical invasion requirement of trespass." Janice Kamenir-Reznik & Kenneth Ehrlich, *Double-Edged Swords: Cleanup Costs, Diminution in Value and the Emergence of Stigma Damages*, 8 LENDER LIABILITY NEWS 10-13 (Dec. 1, 1995).

⁶⁰*Chance*, 1995 Ohio App. LEXIS 1250, at *3.

⁶¹*Chance*, 670 N.E.2d at 990.

⁶²For example, the plaintiffs' attorney in *Chance* stated that "the ruling - the first one by a state high court involving trespass damages against a deep well injector - will make it very difficult or impossible to bring such cases based on stigma in Ohio." *BNA Ohio Supreme Court Rejects Claims Over Deepwell Chemical Injections*, 11 TOXICS L. REP. 701-02 (Nov. 20, 1996).

⁶³See *Chance*, 670 N.E.2d at 993.

⁶⁴*Chance*, 1995 Ohio App. LEXIS 1250, at *22.

allowed. Such a result would subject every company to expend money and other resources to allay the concerns of these individuals.⁶⁵

Additionally, allowing plaintiffs to advance stigma damages claims forces the trier of fact to assume numerous roles, which may usurp the court's valuable time. First, the trier of fact must be psychologist and assess the validity of the alleged perception of an area. This analysis forces the trier of fact to rely on a plaintiff's testimony, the genuineness of which is hard to determine.⁶⁶ Then the trier of fact must be an appraiser and determine the impact of the speculative perception on the value of plaintiff's property. This requires the trier of fact to look into the future and literally predict the effect the alleged perception of the area will have on a piece of property that is not yet touched by any contamination and may never be put up for sale.⁶⁷ Wearing so many different hats places the trier of fact in a complicated position, and without the aid of a crystal ball, the task is almost impossible. That is why tradition has demanded proof of actual damages before a court can award relief.

Actual harm is tangible. It can be measured and evaluated. For example, a plaintiff who has hired a consultant to take samples of his property may have analyses indicating that certain contaminants have migrated to his property. Depending on the level of these contaminants on the property, plaintiff may have actual evidence supporting a claim for trespass, nuisance, or for both types of injury. This evidence can be evaluated through expert testimony, and then a trier of fact is able to make a reasonable determination regarding

⁶⁵The *Adkins* court explained:

If any property owner in the vicinity of the numerous hazardous waste sites that have been identified can advance a claim seeking damages when unfounded public fears of exposure cause property depreciation, the ultimate effect might be a reordering of a polluter's resources for the benefit of persons who have suffered no harm at the expense of those claimants who have been subjected to a substantial and unreasonable interference in the use and enjoyment of property.

Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 727 (Mich. 1992).

⁶⁶See, e.g., *Burnette v. Town of Somers*, No. CV 9455821S, 1997 Conn. Super. LEXIS 1771, at *26-28 (June 27, 1997) (rejecting the plaintiffs' testimony that no one would buy their homes because of the stigma of contamination of the drinking water wells). The *Burnette* court found it much more relevant that actual sales had occurred in the area, each plaintiff was using their home for its intended purpose as a residence, none of the plaintiffs had attempted to market their home and the environmental problem had been remedied. *Id.*

⁶⁷See, e.g., *Muldowney & Harrison*, *supra* note 5, at 536. "Yet those individuals who remain in their homes, and who are probably best acquainted with the true level of risk, may reap benefits in the long run without actually incurring any loss." *Id.* The authors go on to explain that permitting stigma damage claims might encourage property owners to introduce fraudulent evidence of sales or attempted sales, and then the court would "be opening up the judicial system to tenuous claims that would not have clear boundaries or stopping points." *Id.* This is compounded by the fact that valuation of contaminated property, especially in connection with stigma damages, is complex and "replete with difficulties." *Davis & Longo*, *supra* note 5, at 10348.

plaintiff's claims based on actual, physical evidence. Requiring affirmative evidence of harm forecloses an analysis of a claim that is both subjective and nearly impossible to evaluate.

In addition to understanding the complexities associated with stigma damage claims, industries subject to such claims should focus on reducing the fear of these individuals outside the courtroom. Essentially, the source of a plaintiff's fear is risk. The public's perception of risk varies with:

(1) an environmental event's cause (i.e. greater perceived risk from drinking water contaminated by a leaking landfill versus lower perceived risk associated with voluntarily living downstream from a dam); (2) the risk of catastrophe; and (3) the level of familiarity with the type of contamination (greater fear associated with PCB's than with smoking cigarettes even though more people die each year from smoking than from PCB exposure).⁶⁸

Much of this fear is compounded by the complexity of environmental regulations and the lack of education concerning environmental impacts.⁶⁹ Environmental professionals have recognized that there clearly is a "need for better risk communication with the public. . . ." ⁷⁰ Thus, companies dealing with hazardous or toxic chemicals should engage in a proactive approach and target their efforts toward educating communities about the true risks associated with such compounds.⁷¹ Knowledge about risk will reduce fear and hopefully eliminate the source of stigma damage claims. These public information campaigns can be used to extend the impact of *Chance* even further, foreclosing all allegations of unsustained, conceptual and future damages.

IX. CONCLUSION

The inherent uncertainty associated with the existence of a stigma is compounded by the inability to truly ascertain the extent of the public's perception with regard to contamination. When public fear of exposure alone is the basis for damage relief, the validity of the entire legal process is threatened. Recognizing the dangers associated with such claims, *Chance* provides Ohio courts with a directive to require evidence of actual damages

⁶⁸Lorraine Loewandroski, *Toxic Blackacre: Appraisal Techniques & Current Trends in Valuation*, 5 ALB. L.J. SCI. & TECH. 55, 68 (1994).

⁶⁹See, e.g., Forrest & Michaud, *supra* note 56 at 35 (discussing the importance of a good public involvement program because environmental issues can be complicated and intimidating to the public).

⁷⁰*Risk Assessment and Risk Management in Regulatory Decision-Making*, in COMMISSION ON RISK ASSESSMENT AND RISK MANAGEMENT 39 (final report 1997)(addressing technical and policy issues related to health and environmental risk-based decisions).

⁷¹This education should include risk comparisons to help convey both the nature and the magnitude of the particular risk. *Risk Assessment and Risk Management in Regulatory Decision-Making*, *supra* note 70, at 41.

instead of awarding relief for speculative injury. Thus, *Chance* is Ohio's first step toward changing the perception of stigma damages.